In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1526

UNITED STEELWORKERS OF AMERICA, AFL–CIO,
PETITIONER

v.

AUBURNDALE FREEZER CORPORATION, MINUTE MAID COMPANY, AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

1. The Union, in connection with its dispute with Cypress Gardens Citrus Products, Inc., picketed at the truck and railroad entrances to a cold storage warehouse owned by Auburndale Freezer Corporation in which Cypress stored its product. The pickets carried signs indicating that the Union's dispute was only with Cypress. No Cypress employees worked at the warehouse, however, and during the picketing in October 1967, no Cypress trucks came to Auburndale and no Cypress product was shipped from there. (Pet. App. 18–19.) The Board, viewing the Auburndale warehouse as a "common situs"—"a place * * * where both the struck employer and 'secondary' or 'neutral' employers are carrying on business activities," *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal*

Co., 394 U.S. 369, 388–389—applied its *Moore Dry Dock* criteria for determining whether the Union's picketing there was secondary and thus violative of Section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(B), or primary and privileged by the proviso thereto.[1] The Board, with two members dissenting, concluded that there was "sufficient 'presence of the primary'" employer, Cypress, at the Auburndale location to render the Union's picketing there primary, rather than secondary, and accordingly, it dismissed the unfair labor practice complaint against the Union issued by the Board's General Counsel. (Pet. App. 20–21, 23, 24.)[2]

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[1] In *Moore Dry Dock Company*, 92 NLRB 547, the Board ruled that, in a common situs situation, picketing would be deemed primary if it meets the following conditions (p. 549): "(a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs;* (c) the picketing is limited to places reasonably close to the location of the *situs;* and (d) the picketing discloses clearly that the dispute is with the primary employer. * * *"

[2] The Board noted "the following facts which seem to us relevant to establish the 'presence of the primary' at the Auburndale location: (1) Cypress first began storing its product at Auburndale in 1956 under a general warehousing agreement; (2) Cypress and Auburndale executed a 5-year contract in January 1967, whereby the latter agreed to furnish to the former space for 300,000 cases of concentrate; (3) during the picketing Cypress had 150,000 cases of concentrate stored at the Auburndale warehouse; (4) Cypress trucks deliver concentrate to Auburndale in the regular course of business, and during the season, March through July, do so continuously; (5) Cypress drivers remain at Auburndale until they are given a receipt for the concentrate; and (6) the concentrate is shipped from the Auburndale warehouse by common carriers in accordance with instructions given by Cypress." (Pet. App. 21–22.)

2. The court of appeals, with Judge Wisdom dissenting, held that "the finding of the majority of the Board that the picketing was entitled to primary classification is not supported by substantial evidence from the record as a whole and was legally erroneous" (Pet. App. 7). The court, in agreement with the Trial Examiner and the Board minority, found that "the real, indeed the only substantial, object for the picketing at Auburndale, * * * was to shut down operations at * * * [the warehouse] * * *. Inescapably, the purpose was to halt the operations of other employers * * * who were total strangers to the whole controversy." (Pet. App. 7.)[3] The court relied on the facts stressed by the Board minority: "Cypress sent no trucks to Auburndale while it was being picketed," nor did "Auburndale ship any of the Cypress products * * * [by] common carrier"; "Cypress' presence at Auburndale was nothing more than the presence of the 'primary employer's product on the separate premises of a neutral employer independently engaged in the business of providing cold storage services to its customers, and * * * Cypress provided only a minor portion of the Auburndale business' " (Pet. App. 3-4, 5). The court set aside the Board's dismissal of the complaint and remanded the

[3] The Auburndale warehouse is staffed by three Auburndale employees, and approximately 30 employees of Minute Maid Company, who, pursuant to a contract between Auburndale and Minute Maid, perform all warehousing services. Auburndale warehouses products (mostly citrus) for about 20 customers, including Cypress and Minute Maid. Auburndale was obligated by contract with Cypress to furnish storage space for up to 300,000 cases of citrus concentrate, which would occupy approximately 10 percent of the warehouse space. (Pet. App. 29–30.)

case to the Board with directions to enter the remedial order recommended by the Examiner (Pet. App. 7).

3. The basic question here is whether Cypress was sufficiently engaged in its normal business operations at the Auburndale warehouse to permit the Union to carry its picketing against Cypress to those premises, where it would necessarily have an impact on the neutral employers sharing the warehouse.[4] While the Board believes that the court below erred in reversing the Board on this question, the issue turns on the particular facts of this case relating to the extent of Cypress' presence at the warehouse and hence, in the Board's view, does not warrant review by this Court.[5]

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[4] The situation here is distinguishable from that in *Electrical Workers* v. *Labor Board* (General Electric), 366 U.S. 667, and *Steelworkers* v. *Labor Board* (Carrier), 376 U.S. 492, where picketing directed at neutral employers was held to be privileged because they were performing work related to the normal operation of the primary employer's business. In those cases, the work was being done at or adjacent to the primary employer's plants. Here, the picketing in issue did not occur at Cypress' premises, but at those of a secondary employer, Auburndale.

[5] Although the court below stated that the "case is of supreme public importance" (Pet. App. 5), a reading of its opinion as a whole indicates that its decision rests on the particular facts, as does the Board's decision (see n. 2, *supra*). Moreover, the dissenting judge emphasized the "peculiar facts of this case," and expressly stated that he was not holding that "any warehouse is a common situs under the Act for the warehouseman and the primary employer who stores his goods in the warehouse" (Pet. App. 11, 13).

Finally, since the Board found that, during the picketing, Auburndale did not ship any of the Cypress products by common carrier (Pet. App. 19), the question whether the union may appeal to employees of common carriers not to pick up goods of the primary employer stored in an independent warehouse (Pet. 2, 8) is not presented here.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971